On behalf of the respondents it was argued that this item is not a trade dispute as defined in s 2, ie it is not connected with the employment or non-employment or the terms of employment or the conditions of work. It is not a condition of service. The previous collective agreement, continued Encik Chelliah, was a separate matter so that the court acted in excess of jurisdiction.

He cited *The Queen* v *Portus & Anor* (1972) 127 CLR 353 as authority for the proposition that consensual practice of employees and employers cannot expand the jurisdiction of the tribunal. We are inclined to agree with him, and would hold that the tribunal was, on this matter, acting outside its jurisdiction.

Relying on the *Non-Metallic Mineral* case[1] the Industrial Court in this case rejected the applicant's claim. I am in agreement with the Industrial Court. The decision of the Federal Court in the *Non-Metallic Mineral* case[1] is binding on the Industrial Court and indeed on this court as well.

Now, learned counsel on behalf of the applicant contends that the *Non-Metallic Mineral* case[1] is no longer good law as the Federal Court was concerned only with the state of the law prior to May 1980 when the amendment to the Act was effected. I do not agree with the learned counsel's view. The Federal Court's concern with the state of law prior to May 1980 as expressly stated in the judgment relates to s 32(3)(a) only. That provision dealt with finality of the Industrial Court's award which was then repealed by the May 1980 amendment. In my opinion that amendment to s 32(3)(a) has no relevance to the similar issue decided there.

Another amendment to the Act in May 1980, which is relevant to this case, relates to the definition of the words 'trade disputes' in s 2 of the Act. The amendment takes away from the definition the disputes as between workmen and workmen and between employers and employers but retains trade disputes as between employer and his workmen. The 1980 amendment thus confined the Industrial Court's jurisdiction to disputes between the employers and workmen only. The present case is such a dispute. With respect and in this view, the *Non-Metallic Mineral* case[1] is still binding and the Industrial Court award is correct.

On the second argument, that the Industrial Court failed to give proper interpretation and effect to s 30(5A) of the Act and thus declined jurisdiction, learned counsel placed heavy reliance on the Code of Conduct for Industrial Harmony which was approved by the minister in 1975. Code 35 of that Code of Conduct states that collective agreements *may* also cover such matters as:

(c) the deduction by management of trade union subscriptions etc from employees' wages;

Although such matter as check-off is expressly provided in the Code of Conduct for Industrial Harmony, its acceptance is voluntary. This is so expressed by the minister in his foreword to the Code. There is no legal force or sanction for failing to accept such Code of Conduct and Code 35 itself is expressed in permissive terms and in my view it would be futile for the applicant to enforce the term of check-off, which they had themselves to consent in writing, on the first respondent without its agreement.

As regards the Industrial Court's interpretation of s 30(5A) of the Act, the section only allows the court to consider any agreement or such Code of Conduct in its award. But again the section speaks in permissive terms and in interpreting it the Industrial Court adopted the first respondent's contention that the section does not alter the position that a check-off is not a trade dispute within the meaning of the term as defined in s 2 of the Act and therefore the section does not confer extra jurisdiction on the court to award check-off.

I am, again, in agreement with the Industrial Court that in view of the *Non-Metallic Mineral* case[1] on check-off, the Industrial Court is barred from incorporating it in its award in spite of s 30(5A) of the Act. I hold that the Industrial Court has correctly declined jurisdiction in this case.

For these reasons, I dismissed this application.

Application dismissed.

Solicitors: *Genga Maha Wong & Co*; *Ng Yook Woon, Andrew TC Saw & Co.*

Reported by *Ng Sheau Jiuan*

United Manufacturers Sdn Bhd v Sulaiman bin Ahmad & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C506 OF 1983
GUNN CHIT TUAN J
21 JANUARY 1989

Hire Purchase – Notice of intention to repossess vehicle under hire purchase – Whether time limit exists as to when owner must repossess after service of notice – Hire Purchase Act 1967, s 16(1)

Hire Purchase – Notice under s 16(3) of Hire Purchase Act 1967 – Service of – Modes of service – What constitutes prima facie proof of service under Hire Purchase Act 1967 – Hire Purchase Act 1967, ss 43 & 44

Civil Procedure – Triable issues – Bare denials to plaintiff's claim – Denials not substantiated – Whether bare denials can constitute triable issues

By a hire-purchase agreement, the plaintiff let to the first defendant on hire purchase a tractor. The first defendant fell into arrears of hire rentals and was also indebted to the plaintiff

for repairs carried out on the tractor. The plaintiff applied for summary judgment but the application was dismissed by the senior assistant registrar. The plaintiff appealed to the High Court.

The first defendant contended that the plaintiff's repossession of the tractor was unlawful because even if the notice of intention to repossess under s 16(1) of the Hire Purchase Act 1967 ('the Act') was served on the first defendant, it had ceased to have effect by the time the repossession took place more than two years later. Furthermore, the first defendant submitted, notice under s 16(3) of the Act was also not served on him. To this latter contention, counsel for the plaintiff referred to s 43 of the Act and submitted that the duty imposed on it as owner of the tractor was only to post the statutory notice by registered post to the first defendant who was the hirer and that s 43 does not prescribe that the owner has to ensure that the hirer received the notice. As to the first defendant's denial of the sum due and owing, the plaintiff contended that a bare denial is insufficient for the first defendant to rely on as constituting a triable issue.

Held, allowing the plaintiff's appeal:

(1) Section 16(1) of the Act only requires that before repossession, the notice to be served on the hirer must be in writing, in the form set out in the Fourth Schedule, and that the period fixed by the notice has expired, which shall not be less than 21 days after the service of the notice. Section 16(1) does not specify any time limit within which an owner must repossess after service of the s 16(1) notice. So long as the provisions of s 16(1) of the Act have been complied with, the owner can repossess the goods and the relevant notice does not cease to be effective merely because the owner did not actually repossess until two years after service of the said notice so long as the arrears of instalments including arrears of interest due on overdue instalments remain payable and unpaid.

(2) According to s 44 of the Act, the affidavit or oral evidence of an owner or his servant or agent as to the delivery, leaving or posting of any notice or document is admissible as prima facie proof of service, giving or sending of the notice or document. In this case, according to the affidavit of S, it was averred that the s 16(3) notice was sent to the first defendant and that was prima facie proof of service or sending of the notice in question. There was also service of the s 16(3) notice in accordance with the provisions of s 43(c) of the Act.

(3) Even if the court is wrong with regard to the service of the s 16(3) notice, it is to be noted that the first defendant, knowing very well that the tractor had in fact been repossessed by the owner, took no action at all to enforce his rights under the Act to get back the tractor by reinstating the hire-purchase agreement by paying the arrears of instalments etc.

(4) Apart from the averments relating to the service of the notices, the rest of the statement of defence consists of either admissions or mere denials. Even the first defendant's affidavit in reply has not condescended upon particulars. The court considered that there were no triable issues.

[*Editorial Note*: The first defendant has appealed to the Supreme Court vide Civil Appeal No 549 of 1988.]

Cases referred to

1 *Beer* v *Davies* [1958] 2 QB 187 (distd)
2 *Wallingford* v *Mutual Society* (1880) 5 AC 685 (refd)

Legislation referred to

Hire Purchase Act 1967 ss 16(1), (3), 43, 44

Cheong Wee Wong for the plaintiff.
Mohd Nor bin Mohamad for the first defendant.

Cur Adv Vult

Gunn Chit Tuan J: By an agreement dated 15 May 1980 (hereinafter called 'the said hire-purchase agreement'), the plaintiff let to the first defendant on hire purchase a second-hand tractor for the total price of $228,600 payable by a deposit of $18,000 and the balance by 36 monthly instalments of $5,850. The first defendant paid the initial deposit and three months' instalments but thereafter fell into arrears of hire rentals from September 1980 and has not paid any hire rentals since then. The plaintiff has also carried out repairs and supplied spare parts for the said tractor, and the first defendant was indebted to the plaintiff in the sum of $60,492.80 for the spare parts and repairs rendered.

On 7 August 1985 the plaintiff applied for summary judgment but the application was dismissed by the learned senior assistant registrar on 21 November 1985. The plaintiff appealed on 23 November 1985, and after hearing arguments in chambers on 20 October 1987 I dismissed the appeal, and the plaintiff applied for further arguments in open court.

The issues raised by the first defendant which he claimed to be triable issues and which can be gathered from his statement of defence and the affidavit filed in opposition to the plaintiff's application for summary judgment were as follows:

(i) general denial of the sum due and owing;
(ii) notice of intention to repossess under s 16(1) of the Hire Purchase Act 1967 (Revised-1978) (hereinafter referred to as 'the Act') was not served on the first defendant and accordingly the repossession was unlawful; and
(iii) notice under s 16(3) of the Act was not served.

Service of notice under s 16(1) of the Act

Section 16(1) of the Act reads as follows:

> Subject to this section, an owner shall not exercise any power of taking possession of goods comprised in a hire-purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless there had been two successive defaults of payments or a default in respect of the last payment and he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice.

As regards service of the notice under s 16(1) of the Act, counsel for the plaintiff pointed out that the address of the first defendant as stated in the said hire-purchase agreement is 46, Kg Buloh, Kuala Brang, Kuala Trengganu. The said notice was served on the first defendant at

the aforesaid address by way of AR registered post and the same was duly acknowledged as received by him (vide exhs UM-76 and UM-77 to encl 15). The clear acknowledgement of receipt on the AR card by the first defendant showed that the first defendant's defence that he did not receive the notice was untrue.

Encik Mohd Nor, counsel for the first defendant, pointed out that in the first defendant's affidavit in reply it was averred that the repossession was unlawful because even if the notice of intention to repossess was served on the first defendant, it has ceased to have effect by the time the repossession took place more than two years later.

The relevant notice of intention to repossess under s 16(1) of the Act was as follows:

> United Manufacturers Sdn Bhd Lot 2 & 4, Jalan 13/2, PO Box 1064, Petaling Jaya, Selangor, Malaysia
> Tel: 775755 (5 lines), Telex: MA 37599, Cable: Uniman Petaling Jaya
>
> Encik Sulaiman bin Ahmad
> 46, Kg Buloh, Kuala Brang
> Kuala Trengganu
> Trengganu
>
> AR registered
> 15 July 1981
>
> Dear Sir
> Notice under Hire Purchase Act 1967 (section 16)
>
> Notice of Intention to Re-possess
>
> Take notice that United Manufacturers Sdn Bhd the owner of used Fiat Allis AD14B/7 E/No 008011 C/No 010727 hired by you under agreement no UM/PJ-37/80 dated 15 May 1980 intends to retake possession of the goods after expiration of 21 days from the service of this notice unless the arrears of instalments including arrears of interest due on overdue instalments which now amount to $73,232.32 are paid to United Manufacturers Sdn Bhd, Lots 2 and 4, Jalan 13/2 PO Box 1064, Petaling Jaya, Selangor, Malaysia on or before 5 August 1981.
>
> | | | |
> |---|---|---|
> | Total amount payable | | $228,600.00 |
> | Amount paid by hirer to 15 July 1981 ... | | $ 29,700.00 |
> | Arrears under agreement to 15 July 1981 ... | $ 70,200.00 | |
> | Overdue interest at $1.28 per day ... | $ 3,032.32 | $ 73,232.32 |
>
> Note: This notice is issued without prejudice to any rights already accrued to us under any previous similar notice which may have been served on you.
>
> Yours faithfully,
> United Manufacturers Sdn Bhd
> (sgd)
>
> cc Mr Lee Kee Fong
> 4-F, Jalan Pulau Kambing
> Kuala Trengganu, Trengganu
> Encik Katas Husin Mr Wong Sang

The repossession was on 28 September 1983 and it was the contention of Encik Mohd Nor that it was not unacceptable for the first defendant to say that he did not receive the notice because he applied his mind to the period immediately before or within a reasonable period before the repossession. Counsel conceded that the notice under s 16(1) was indeed served on the first defendant but submitted that the notice had ceased to be effective by the time repossession was carried out, and stated that the notice to be given to a hirer under s 16(1) is a strict requirement of the law and there was therefore a triable issue whether in the circumstances there has been compliance with the requirements of the law.

On this point I was of the view that s 16(1) of the Act only requires that before repossession, the notice to be served on the hirer must (i) be in writing, (ii) in the form set out in the Fourth Schedule, and (iii) the period fixed by the notice has expired, which shall not be less than 21 days after the service of the notice. Section 16(1) does not specify any time limit within which an owner must repossess after service of the s 16(1) notice. In my view, so long as the provisions of s 16(1) of the Act have been complied with, the owner can repossess the goods and the relevant notice does not cease to be effective merely because the owner did not actually repossess until two years after service of the said notice so long as the arrears of instalments including arrears of interest due on overdue instalments remain payable and unpaid.

Service of notice under s 16(3) of the Act

Section 16(3) of the Act is as follows:

> Within fourteen days after the owner has taken possession of goods that were comprised in the hire-purchase agreement he shall serve on the hirer and every guarantor of the hirer a notice, in writing, in the form set out in the Fifth Schedule.

Counsel for the plaintiff stated that the relevant notice under s 16(3) of the Act was dated 8 October 1983 and was addressed to the first defendant at 46, Kg Buloh, Kuala Brang, Kuala Trengganu which is his address as stated in the said hire-purchase agreement. The said notice was sent to him by way of AR registered post but was returned with the remark 'Retour'. Counsel then referred to para 1 of the first defendant's statement of defence wherein it was averred that the first defendant admits paras 1, 2 and 4 of the amended statement of claim and para 2 of the amended statement of claim is as follows: 'The first defendant has an address at 46, Kampong Buloh, Kuala Brang, Kuala Trengganu, Trengganu.' Reference was also made to the first defendant's affidavit affirmed on 14 October 1985 wherein the defendant has affirmed on oath that his address was 46, Kg Buloh, Kuala Brang, Trengganu. Counsel for the plaintiff therefore submitted that at all material times the first defendant was at 46, Kg Buloh, Kuala Brang, Kuala Trengganu, the address to which the s 16(3) notice was sent. It was also submitted by him that in any event if the first defendant did change his address, it was incum-

bent on him to notify the plaintiff of the change of address; but the plaintiff was not notified of any change of address by the first defendant. Counsel also pointed out that apart from a denial by the first defendant that the notice under s 16(3) was served on him, he did not say what his address was at the time the said notice was issued. It was also contended that if the first defendant failed to notify the plaintiff of any change of address he did so at his peril and could not rely on his failure to notify the plaintiff of his change of address and to state that he has not received the s 16(3) notice. The plaintiff had done all that he could to bring the said notice to the knowledge of the first defendant on 8 October 1983.

Counsel then referred to s 43 of the Act which is as follows:

> Any notice or document required or authorized to be served on or given or sent to an owner or hirer under this Act may be served or given or sent –
> (a) by delivering it to him personally;
> (b) by leaving it at his place of abode or business with some other person apparently an inmate thereof or employed thereat and apparently of or over the age of sixteen years; or
> (c) by posting it by registered post addressed to him at his last known place of abode or business.

and submitted that the duty imposed on the plaintiff as the owner of the tractor was only to post the statutory notice by registered post to the first defendant who was the hirer. He stated that the above quoted section of the Act does not prescribe that the owner has to ensure that the hirer received the notice, and submitted that to say otherwise would place an unreasonable burden on the plaintiff if the first defendant attempted to evade service or did not notify the plaintiff of his change of address. Counsel also stated that the hirer could remain at his address but yet refuse to acknowledge the AR card and thereby thwart the owner's attempt to serve the notice on him. He further submitted that if it was the intention of the legislature to ensure that notices are actually received by the hirer then it would have been expressly provided for in the Hire-Purchase Act 1976.

Encik Mohd Nor stated that the notice under s 16(3) of the Act was sent to the plaintiff's address but was returned with the remark 'Retour'. He stated that the service fell within s 43(c) of the Act, and by virtue of the following s 44 of the Act it was prima facie proof of service:

> The affidavit or oral evidence of an owner or his servant or agent as to the delivery, leaving or posting of any notice or document required or authorized to be served, given or sent by this Act is admissible as prima facie proof of service, giving or sending of the notice or document.

Counsel contended, however, that since there was prima facie proof only as opposed to conclusive evidence the same could be disproved. He also contended that if it was intended by the legislature that proof of due posting is incontrovertible proof of service it would have said so by making it conclusive evidence either in s 43 or s 44 of the Act. He further contended that the fact that the notice was returned undelivered to the first defendant was clear and unchallenged evidence which rebutted the prima facie proof of service as provided for in s 44 of the Act.

On the question of change of address, Encik Mohd Nor stated that there was no provision in the said hire-purchase agreement which required the first defendant to notify the plaintiff of a change of address. He stated that the first defendant was in fact resident at the address in question but somehow the letter was returned and there was no evidence that it was the first defendant himself who returned it and as such the first defendant was not precluded from relying on the fact that the notice was not received by him. He contended that looking at the AR card (exh UM-82) the notice was not delivered to the first defendant and before he could return it he would have had to receive it and the AR card would have been acknowledged if that was the case.

Counsel then referred to *Beer* v *Davies*[1] in which case an omnibus driver, who was involved in a minor road accident while driving his omnibus, gave his usual home address to the police officer who took particulars of the accident. He was given no warning of any proposed prosecution under Part I of the UK Road Traffic Act 1930, but ten days after the accident the police, under s 21(c) of the Act, sent to him by registered post at his usual address a notice of intended prosecution for careless driving. Section 21 of the UK Road Traffic Act 1930 is as follows:

> Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating ...to reckless or dangerous driving, and to careless driving he shall not be convicted unless either – (a) ... or (b) ... or (c) within ... fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence.

The defendant did not in fact receive the notice as he had gone away for a week's holiday, and as there was no one at his home to take delivery of registered post the notice was returned by the post office to the police marked accordingly. In a prosecution for careless driving the magistrate took the view that the terms of s 21(c) as to the service of the notice had not been complied with, and he accordingly dismissed the information. On appeal by the police it was held that the requirements of s 21(c) were not sufficiently complied with by the mere sending of the notice by registered post to the defendant's usual address. As the notice had not been delivered to him within the statutory period there had not been good service within the meaning of the section.

With respect, I considered that the provisions of ss 43 and 44 of our Hire Purchase Act 1967 are different from the provisions of s 21(c) of the UK Road Traffic Act. In my view s 44 of our Act is concerned with proof of service of any notice or document required to be served, given or sent by the Act. According to that section the affidavit or oral evidence of an owner or his servant or agent as to the delivery, leaving or posting of any notice or document is admissible as prima facie proof of service, giving or sending of the notice or document. In this case according to an affidavit of one M Sivalingam affirmed on 30 July 1985, it was averred that the s 16(3) notice was sent to the first defendant on 11 October 1983, and that was prima facie proof of service or sending of the notice in question. Then it is clearly provided in s 43 of the Act, which is the section concerned with the service of notices, that any notice or document required or authorized to be served on or given or sent to a hirer under the Act may be served or given or sent by delivering it to him personally; by leaving it at his place of abode or business with some other person apparently an inmate thereof or employed thereat and apparently of or over the age of 16 years; or by posting it by registered post addressed to him at his last known place of abode or business. There was in my judgment service of the s 16(3) notice in accordance with the provisions of s 43(c) of our Hire Purchase Act 1967. Even if I was wrong in my view regarding the service of the s 16(3) notice, it is to be noted that the first defendant knowing very well that the tractor had in fact been repossessed by the owner on 28 September 1983 (vide receipt marked exh UM-78), took no action at all to enforce his rights under the Act to get back the tractor by reinstating the said hire-purchase agreement by paying the arrears of instalments etc.

Denial of liability

Plaintiff's counsel has submitted that a bare denial is insufficient for the first defendant to rely on as constituting a triable issue (see *Wallingford* v *Mutual Society*[2] per Lord Blackburn at p 704), unless the grounds on which he relies as showing that he is not indebted are stated. He also pointed out that the first defendant's affidavit dated 14 October 1985 in opposition to the application for summary judgment only challenged that part of the plaintiff's claim relating to spare parts and services. In so far as the sum of $201,622.08 due and owing under the said agreement is concerned, the denial of the first defendant was not substantiated. As regards the plaintiff's claim for $60,492.80, counsel conceded that there was no pleading regarding the costs of insurance cover amounting to $5,741 for which the first defendant has to reimburse the plaintiff, and agreed that the said sum should be deducted from the $60,492.80. Counsel also conceded that interest for late payment was not provided for in the said agreement. Finally, Mr Cheong pointed out that all the invoices sent to the first defendant were never acknowledged and that such invoices were dated as far back as 1980 and had also never been denied by the first defendant.

Encik Mohd Nor, however, submitted that the first defendant's denial of indebtedness was not as bare as was claimed by the plaintiff's counsel because it was based on the averments regarding non-service of the relevant notices. As regards the claim for spare parts and services rendered, counsel stated that the exhibits to the plaintiff's affidavits were not records of delivery and repairs but the plaintiff's own invoices and delivery notes which do not show any acknowledgement by the first defendant. He submitted that there were therefore bona fide issues to be tried.

Looking at the statement of defence, I would agree that apart from the averments relating to the service of the notices, the rest of the defence consists of either admissions or mere denials. Even the first defendant's affidavit in reply dated 14 October 1985 has not condescended upon particulars.

Having heard further arguments in open court I then considered that there were no triable issues and decided that my decision in chambers dated 20 October 1987 dismissing the plaintiff's appeal from the learned senior assistant registrar ought to be set aside for the reasons stated above. I therefore allowed the appeal and ordered that the plaintiff be at liberty to enter judgment against the first defendant for the sum of $251,618.46; in respect of $201,662.08, simple interest at 8% pa calculated on daily basis from 9 October 1983 to date hereof and interest on the judgment sum at 8% pa from date hereof to date of payment and costs.

Appeal allowed.

Solicitors: *Rashid & Lee; Wong-Chooi & Mohd Nor.*

Reported by *Ng Sheau Jiuan*